

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 CV

8388

THE MOUNT SINAI HOSPITAL,

Plaintiff,

v.

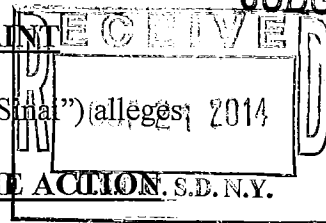
ATTACHMATE CORPORATION,

Defendant.

CIVIL ACTION NO.:

JURY TRIAL DEMANDED

COMPLAINT



JUDGE ABRAMS

Plaintiff the Mount Sinai Hospital ("Mount Sinai") alleges:

NATURE OF THE ACTION, S.D. N.Y.

1. This is a civil action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, for a declaration that Mount Sinai has not infringed any valid copyright of Attachmate Corporation ("Attachmate") and has not breached any contract between Mount Sinai and Attachmate. Alternatively, this action is for breach of contract against Attachmate for failure to comply with its contractual obligations.

2. Since 2007, Attachmate has become a frequent flier in federal courts, concocting a business plan unique in the software industry. Rather than merely selling its software and licenses, Attachmate has instead threatened or commenced litigation against its existing customers based on an unreasonably aggressive and legally baseless reading of a click-wrap or click-through software license agreement. Attachmate "audits" its customers, inevitably claiming to have found software over-deployment that greatly exceeds the number of licenses the customer has purchased. This predatory scheme has resulted in the filing of at least 25 identical

lawsuits across the country, most involving healthcare providers. A list of these lawsuits is attached as Exhibit A.

3. Mount Sinai has been a long-time customer of Attachmate that has spent millions purchasing Attachmate's software licenses and upgrades.

4. However, Attachmate now has decided to employ its scheme against this long-time customer. Attachmate has "audited" Mount Sinai and demands payment of over \$10 million in additional licenses fees, back maintenance, and back interest. Attachmate claims that Mount Sinai was contractually obligated to purchase almost 10,000 additional software licenses, even though only about 1400 devices had the Attachmate software installed on their hard drives, and only approximately 1000 users had the potential to access the software for interactive use. Attachmate separately demands: (1) that Mount Sinai purchase annual maintenance going back four years on devices that Attachmate claims required a license, even though there are no contractual provisions supporting this demand, and (2) substantial payments for back interest without any contractual basis to do so. Mount Sinai has brought this declaratory judgment action to stop this unfair practice.

THE PARTIES

5. Mount Sinai is a not-for-profit hospital with its principal place of business located at One Gustave L. Levy Place, New York, New York 10029. Founded in 1852, Mount Sinai is a 1,171-bed, tertiary-care teaching facility acclaimed internationally for excellence in both inpatient and outpatient clinical care

6. Upon information and belief, Defendant Attachmate is a corporation organized under the laws of the State of Washington, with its principal place of business located at 705 5th Avenue South, Suite 1100, Seattle, WA 98104. Attachmate is in the business of licensing

various software products. Upon information and belief, Attachmate is a subsidiary of a privately held enterprise software holding company called The Attachmate Group, Inc.

JURISDICTION AND VENUE

7. By this action, Mount Sinai seeks a declaratory judgment that: (a) Mount Sinai has not breached any contract with Attachmate; (b) Mount Sinai has not infringed any valid copyright of Attachmate; and (c) if a contract exists between Mount Sinai and Attachmate, that Attachmate breached the contract.

8. To the extent this action arises under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

9. This case involves an actual controversy between the parties for which declaratory relief is sought, pursuant to 28 U.S.C. §§ 2201 and 2202, regarding their respective rights and other legal relations arising under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

10. The amount in controversy between the parties exceeds \$75,000, exclusive of interest and costs. Mount Sinai and Attachmate are citizens of different states. Accordingly, this Court has jurisdiction over the claims over the software licensing agreement under 28 U.S.C. § 1332.

11. The Court also has supplemental jurisdiction over the software licensing disputes discussed below, because these claims are so related to the federal Copyright claims that they form part of the same case or controversy.

12. This Court has personal jurisdiction over Defendant Attachmate because Attachmate conducts substantial and regular business activities in the District. Attachmate maintains an office in the District (at One Penn Plaza, 36th Floor, New York, New York) and is registered to conduct business in the State of New York.

13. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400(a) because, for venue purposes, Attachmate resides in this judicial district.

14. A substantial part of the events or omissions giving rise to Mount Sinai's claims occurred within this judicial district with respect to this civil action.

FACTUAL BACKGROUND

Background

15. For a number of years, Mount Sinai has purchased and used Attachmate products as part of its normal business operations. The Attachmate products that are relevant to the current dispute are a family of Attachmate software products referred to as "Reflection." Mount Sinai purchased and used various versions of Reflection, including products known as "Reflection Multi-Host Standard," "Reflection Standard Suite" and "Reflection 2014" (collectively "Reflection Products")

16. The Reflection Products are a form of terminal emulation software, designed to connect Windows-based devices with other non-Windows operating systems. The software allows users to access data or programs (such as accounts payable or payroll programs) on a host server from an individual computer. In this way, a Reflection Product acts as a middleman between the individual user's computer and the host server.

17. Because of the distinct function of the Reflection Products, the software is not used widely in Mount Sinai's system. Approximately 1400 of Mount Sinai's computers have a copy of the Reflection Products installed or loaded on their permanent or temporary memory. Attachmate does not claim that there was any over-installation of these local copies.

18. Approximately 1000 Mount Sinai users can interactively use the Reflection Products by accessing a copy located on Mount Sinai's Citrix servers. These users can use the

Reflection Products to access certain programs on Mount Sinai's servers, but only if they have a password for those programs. The number of passwords available (and by extension the number of users) to access those programs is less than the total number of licenses Mount Sinai owned.

19. Thus, no more than approximately 1000 total users could or would ever have reason to use Reflection interactively to access any of those underlying programs.

The Software License Agreement

20. Attachmate's default method of conveying an offer of license and its terms is through a click-wrap or click-through license, whereby the purchaser accepts the terms of the license at the time of installation or download.

21. Attachmate included with the software an "Attachmate Software License Agreement" ("License Agreement"), a copy of which is attached as Exhibit B. Attachmate wrote the License Agreement without input from or negotiations with Mount Sinai.

22. The License Agreement included a "Product Use Rights Appendix" that set forth the license type and the terms of the license usage. *See* Exhibit B at 6. The License was a "desktop" license, which required the purchaser to acquire licenses pursuant to the following terms:

You must acquire and dedicate a desktop license (i) for each device (including virtual machines and portable-storage devices) on which the Software or any component of the Software is installed or loaded in the permanent or temporary memory of the device and (ii) for each additional end-user device (including virtual machines) through which a copy of the Software could be accessed for interactive use. Notwithstanding the foregoing, you may create copies of the Software on network storage devices and on server-class computers for the sole purpose of serving your licensed devices, and such copies will not consume license count.

Id.

The License Agreement also included a “person exception” that allowed the primary-user of a licensed device to

(i) use any device to operate such primary-user licensed device remotely; (ii) operate one designated home or portable device as an alternative primary device (which alternative primary device may have an additional copy of the Software); and (iii) operate the Software from outside of your corporate network via devices which are not primarily used for your business purposes (for example, personal and public devices).

Exhibit B at 6.

23. After purchase from Attachmate (at various dates from 2011 to 2013), Mount Sinai downloaded and installed Attachmate’s products onto Mount Sinai’s servers.

Attachmate’s Audit of Mount Sinai’s Software Usage

24. On July 1, 2014, Attachmate sent a letter to Mount Sinai requesting an audit of Mount Sinai’s usage of Attachmate’s software products, including the Reflection Products. Rather than conduct the audit itself, Attachmate asked Mount Sinai to work with the third-party auditor Deloitte & Touche LLP. Mount Sinai fully cooperated at every stage of the audit, and over the course of the next two months, collected information from its network regarding the installed Reflection Products. In doing so, Mount Sinai followed Attachmate’s program scripts to comply with Attachmate’s requests.

25. On September 2, 2014, Attachmate sent Mount Sinai an email comparing the identified installations of Attachmate software with Mount Sinai’s license entitlement. Attached to that email was a spreadsheet that purported to show that Mount Sinai had “overdeployed” the Reflection Products on 9762 additional devices, and thus it needed to purchase a commensurate number of additional licenses. Attachmate demanded that Mount Sinai resolve the so-called license shortfall, and do so within 30 days.

26. Following some discussions, on October 16, 2014, Attachmate sent Mount Sinai an email demanding payment for the allegedly over-deployed software at a rate of \$417 per unit or over \$4 million. Attachmate also claimed that it was entitled to back interest of over \$1.95 million and back “maintenance” fees of over \$4.8 million. The total demand, therefore, was over \$10.2 million.

Attachmate Seeks Payment Based on Various Incorrect Bases

27. Mount Sinai disputed and continues to dispute several of the grounds on which Attachmate bases its claims for payment.

28. First, Mount Sinai has investigated Attachmate’s claims, and discovered that Attachmate has based the number of alleged “deployments” upon a mistaken view of the total number of users or devices that could have accessed the Reflection Products for interactive use.

29. The bulk of Attachmate’s claim turns on its analysis of Mount Sinai’s Citrix network. Citrix is a terminal server that allows users or devices to gain secure access to a mainframe or host server through their desktops or laptops through a virtual private network (VPN). This technology is commonplace in large corporations, and permits remote users or devices to access the network. Attachmate claimed that 9,762 unauthorized machines could have accessed or used its Reflection Products through Mount Sinai’s Citrix network.

30. However, Mount Sinai was required to purchase licenses for a far smaller universe of users and devices. As noted above, the License Agreement required Mount Sinai to purchase a software license for each device through which “a copy of the Software could be accessed for interactive use.” Few hospital personnel actually have or had the ability to interactively use the Reflection Products through Citrix. These users or devices can interactively use the Reflection Products to access certain programs on Mount Sinai’s servers, but only if they

have a password for those programs. Only approximately 1000 people have been issued such credentials — all of whom are employees who need access to the password protected programs or data on Mount Sinai's mainframe/UNIX (the target programs) through the Reflection Products. No other employees or devices could or would be able to use or "access" the Reflection Products for "interactive use," because no other employees had the credentials (username and password), much less the need to use those programs. Thus, the number of people or devices that had the potential to "access" the Reflection Product for "interactive use" was far fewer than what Attachmate claims, and was certainly far fewer than the number of Reflection licenses that Mount Sinai owned.

31. Second, as noted above, the Software license agreement included a "person exception" that allowed the primary-user of a licensed device to remotely access the software by (1) remotely accessing the licensed device, (2) operating an alternative primary device, and (3) operating the software from a device outside the network. Attachmate's analysis failed to account for devices that fell under this exception.

32. Third, Attachmate has obstructed any proposed performance under the contract. Although Mount Sinai does not admit that any shortfall existed, Attachmate has instructed Mount Sinai that it has to make up for any alleged license shortfall by purchasing Reflection Products at a price that is approximately double the prices charged by Attachmate's authorized resellers. Upon information and belief, Attachmate has instructed its software resellers not to provide Mount Sinai with any Reflection Products. Attachmate continues to maintain that Mount Sinai must purchase any further licenses directly from Attachmate at prices that are far higher than the prices normally charged. Throughout the years that Mount Sinai has used Reflection Products, it has purchased the product through authorized, third-party resellers.

33. Fourth, Attachmate makes baseless claims for back-maintenance fees. Attachmate claims that Mount Sinai had to purchase maintenance for each device for which Attachmate claims that Mount Sinai needs a license. However, there is nothing in the License Agreement (or any other contract or agreement between Mount Sinai and Attachmate) that requires Mount Sinai to purchase maintenance for each device that Attachmate subsequently contends should have had a license.

34. Fifth, Attachmate makes baseless claims for back-interest. The License Agreement does not provide for any interest component. Further, the Attachmate License Agreement permits a licensee accused of a license shortfall to acquire additional licenses, from any source, within 30 days without payment of any interest. In addition, the amount claimed by Attachmate is not liquidated and is not readily determinable by computation with reference to a fixed standard contained in the contract.

35. Sixth, Attachmate claims that the alleged over-deployment implicates copyright law, and that Mount Sinai has infringed on Attachmate's copyrights in the Reflection Products. However, Mount Sinai has always had a license for the Reflection Products.

36. Seventh, some of Attachmate's claims are barred (in whole or in part) by the statute of limitations. Any copyright infringement claim that occurred more than three years before the date of this complaint is barred by 17 U.S.C. § 507. Any breach of contract claim that occurred more than six years ago is barred by Washington Rev. Code § 4.16.040.

37. Mount Sinai has maintained and continues to maintain, that it has and has always had a lawful number of licenses for use of the Reflection Products and, therefore, has never over-deployed any such product and has not violated any copyrights.

38. An actual and substantial controversy exists of sufficient immediacy and reality to warrant the issuance of a declaratory judgment that: (1) Mount Sinai has not breached the Licensing Agreement; (2) Mount Sinai has not infringed Attachmate's alleged copyrights; and (3) if the parties are bound by the License Agreement, that Attachmate has breached the agreement.

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT - BREACH OF CONTRACT

39. Mount Sinai realleges and incorporates by reference every allegation contained in paragraphs 1 through 38 above.

40. Attachmate has expressed its present and immediate intention to escalate its dispute with Mount Sinai to seek a total of over \$10.2 million for the alleged over-deployment of Reflection Products, which Attachmate claims is a breach of the Licensing Agreement.

41. An actual controversy has arisen and now exists between Mount Sinai and Attachmate concerning whether there is a legally binding agreement and whether, if such an agreement exists, Mount Sinai owes Attachmate any monies relating to the licensing of the Reflection Products, back maintenance, or back interest.

42. Mount Sinai is entitled to a declaration that it owes no monies to Attachmate for any purported over-deployment of the licensed software, back maintenance, or back interest.

SECOND CAUSE OF ACTION

DECLARATORY JUDGMENT - COPYRIGHT INFRINGEMENT

43. Mount Sinai realleges and incorporates by reference every allegation contained in paragraphs 1 through 42 above.

44. Attachmate has expressed its present and immediate intention to escalate its dispute with Mount Sinai to seek damages for the alleged over-deployment of Reflection Products, which it maintains constitutes an infringement of Attachmate's copyrights.

45. An actual controversy has arisen and now exists between Mount Sinai and Attachmate concerning whether Mount Sinai has infringed any copyright owned by Attachmate.

46. Mount Sinai is entitled to a declaration that it has not infringed any copyright owned by Attachmate.

THIRD CAUSE OF ACTION

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

47. Mount Sinai realleges and incorporates by reference every allegation contained in paragraphs 1 through 46 above.

48. Each pertinent license agreement contained an implied covenant of good faith and fair dealing. That covenant required Attachmate not to act in such a manner as to deprive Mount Sinai of the benefits owed to it under these contracts. Attachmate's continued insistence that Mount Sinai acquire additional software licenses for products that were not used under the terms of such contracts, and pay additional fees for back interest and back maintenance, constitutes a breach of implied covenant of good faith and fair dealing.

49. Attachmate's unreasonable demands for payment have deprived Mount Sinai of the benefits of the contract. Attachmate seeks to evade its obligations to Mount Sinai.

RELIEF REQUESTED

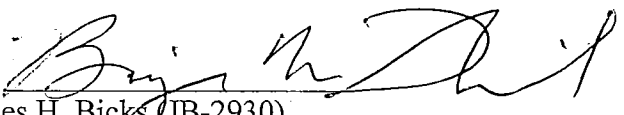
WHEREFORE, Plaintiff Mount Sinai Health Systems respectfully requests that this Court enter a judgment:

- A. Declaring that Mount Sinai has not breached any contract with Attachmate relating to any alleged over-deployment of Reflection Products or related maintenance or interest;
- B. Declaring that Mount Sinai is not liable to Attachmate for infringement of any copyright owned by Attachmate for the Reflection Products;
- C. Awarding damages against Attachmate and in favor of Mount Sinai for the harms it has suffered and continues to suffer as a result of Attachmate's breach of the implied covenant of good faith and fair dealing;
- D. Awarding Mount Sinai its costs and expenses of suit, including all reasonable attorneys' fees it has incurred and will incur in this matter;
- E. Awarding Mount Sinai prejudgment and postjudgment interest; and
- F. Granting Mount Sinai such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury on all issues triable of right by a jury.

Dated: October 20, 2014

By: 
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EXHIBIT A

Exhibit A
List of Attachmate Cases Involving Similar Allegations Since 2007

1. *Pacific Life Insurance Company v. Attachmate Corporation*, Case No. 14cv01265 (S.D.N.Y.)
2. *Saks Incorporated v. Attachmate Corporation*, Case No. 14CV4902 (S.D.N.Y.)
3. *Union Hospital, Inc. v. Attachmate Corporation*, Case No. 2:14-cv-45 (S.D. Ind.)
4. *Waddell & Reed, Inc. and W&R Corporate LLC v. Attachmate Corporation*, Case No. 2:14-cv-2202 (D. Kan.)
5. *Entergy Services, Inc. v. The Attachmate Group*, Case No. 13-5297 (E.D. La.)
6. *Wellmont Health System v. Attachmate Corporation*, Case No.2: 13-cv-00035 (E.D. Tenn.)
7. *Tri-Health, Inc. v. Attachmate Corporation*, Case No. 1:12-cv00901 (S.D. Ohio)
8. *Covance Inc. v. Attachmate Corporation*, Case No.3: 12-cv-04088 (D.N.J.)
9. *Wellspan Health v. Attachmate Corporation*, Case No. 1:12-cv-00109 (M.D. Pa.)
10. *University of Rochester v. Attachmate Corporation*, Case No. 6:12-cv-06019 (W.D.N.Y.)
11. *Northwest Community Hospital v. Attachmate Corporation*, 1:11-cv-06916 (N.D. Ill.)
12. *Franciscan Missionaries of Our Lady Health System, Inc., et al v. Attachmate Corporation*, Case No. 3:11-cv-00582 (M.D. La.)
13. *Polo Ralph Lauren, et al v. Attachmate Corporation*, Case No.1: 11-cv-0 1890 (S.D.N.Y.)
14. *SuperValu v. Attachmate Corporation*, Case No. 07-cv03164 (D. Minn.)
15. *Attachmate Corporation v. Celcom Axiata Berhad*, Case No. 2:10-cv-00526 (W.D. Wash.)
16. *Attachmate Corporation v. Public Health Trust of Miami-Dade County Florida*, Case No. 2:09-cv-01180 (W.D. Wash.);
17. *Attachmate Corporation v. Health Net, Inc.*, Case No. 2:09-cv-01161 (W.D. Wash.)
18. *Attachmate Corporation v. Tarmac Ltd.*, Case No. 2:08-cv01370, (W.D. Wash.)
19. *Attachmate Corporation v. Sentry Insurance*, Case No. 2:08-cv-01035 (W.D. Wash.)
20. *Attachmate Corporation v. Jeld-Wen Inc.*, Case No. 2:08-cv-00897 (W.D. Wash.)
21. *Attachmate Corporation v. United Technologies Corp.*, Case No. 2:08-cv-00799 (W.D. Wash.)
22. *Attachmate Corporation v. Windstream Communications Inc.*, Case No. 2:08-cv-00190 (W.D. Wash.)
23. *Attachmate Corporation v. Dell Inc.*, Case No. 2:07-cv-00283 (W.D. Wash.)
24. *Attachmate Corporation v. Juniper Networks, Inc.*, Case No. 2:07-cv-00802 (W.D. Wash.)
25. *Attachmate Corporation v. Carnival Corporation*, Case No. 2:07-cv-01730 (W.D. Wash.)

EXHIBIT B

ATTACHMATE® SOFTWARE LICENSE AGREEMENT

REFLECTION® FOR IBM® v14.1;

REFLECTION® FOR UNIX AND OPENVMS v14.1;

REFLECTION® FOR HP WITH NSVT v14.1;

REFLECTION® FOR THE MULTIHOST ENTERPRISE [either Edition] v14.1;

REFLECTION® X v14.1; or REFLECTION® SUITE FOR X v14.1:

IMPORTANT -- READ CAREFULLY:

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